BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE AMENDED WATERMASTER INSTRUCTIONS FOR DISTRIBUTION OF WATER AMONG WATER RIGHTS NOS. 36-02659, 36-02708, 36-07004, 36-7201, AND 36-07218, AND NOTICE OF INTENT TO REDISTRIBUTE FLOWS.	)	**FINAL ORDER**

INTRODUCTION

This matter is before the Director of the Idaho Department of Water Resources ("Director" or "IDWR") following the issuance of a recommended decision and order by the IDWR Hearing Officer, D. Duff McKee. The action arises from a petition by Clear Lakes Trout Company ("Clear Lakes" or "Lakes") challenging the Director's instructions to the watermaster for Water District No. 130 for the distribution of water rights owned by petitioner Clear Lakes and the respondent Clear Springs Foods, Inc. ("Clear Springs" or "Springs"). The petition also challenges the water distribution actions taken by the watermaster pursuant to the Director's instructions. The Hearing Officer recommended that the Director enter an order dismissing Clear Lakes' petition.

A recommended order may become a final order only upon review of the agency head in accordance with Idaho Code § 67-5244. The agency head on review of a recommended decision exercises all the decision-making authority that he would have had if the agency head had presided over the hearing. Idaho Code § 67-5244.

The matter was heard on pending motions at the IDWR conference room in Boise on Friday, March 14, 2003. Clear Lakes appeared by company representatives and Daniel V. Steenson and Charles L. Honsinger of the law firm Ringert Clark Chartered. Clear Springs

appeared by company representative and John K. Simpson and Travis L. Thompson of the law firm Barker Rosholt & Simpson LLP. The motions presented to the Hearing Officer consisted of the motion by Clear Lakes for summary judgment, the motion by Clear Lakes for a stay of enforcement of order, and the motion by Clear Springs for a dismissal of the petition.

The Hearing Officer determined that he had been provided with thorough and well-reasoned briefs from counsel on all potential issues involving all of the motions. He further determined that he was satisfied from the materials submitted by the parties through their counsel that there was no material fact in issue, and that the matter was appropriate for resolution by summary proceedings on motion rather than evidentiary proceeding, pursuant to Rule 413 of IDWR's Rules of Procedure. IDAPA 37.01.01.413.

Summary of Hearing Officer's Decision

The Hearing Officer recommended that the Director enter an order denying the motions advanced by Clear Lakes and grant the motion advanced by Clear Springs. The Hearing Officer recommended that the Director conclude that the orders contained in the instructions of the Director to the watermaster dated June 13, 2002, were and are: (1) consistent with the statutory authority of the Director; (2) consistent with the adjudicated water rights of the parties to this matter as determined by judicial decree of the Snake River Basin Adjudication ("SRBA") District Court and affirmed by the Idaho Supreme Court; and (3) consistent with the terms of the order of the Director adopting and interpreting the document referred to as the "Interim Stipulated Agreement." The Hearing Officer also recommended that the Director deny any interim stay of the instructions of the watermaster. Finally, the Hearing Officer recommended that the Director grant the motion for dismissal advanced by Clear Springs and enter an order dismissing the petition as to the issues challenging the Director's instructions to the watermaster.

The Director has reviewed the recommended decision and order of the Hearing Officer. No exceptions were filed with the Director to the Hearing Officer's decision. The Director concurs with the factual and legal determinations made by the Hearing Officer and adopts the substance of the Hearing Officer's recommendations for order in this matter. The Director hereby enters a final order in this matter with the following findings of fact, analysis, conclusions of law, and order:

FINDINGS OF FACT

Prior Litigation between the Parties

1. Clear Lakes and Clear Springs operate fish hatcheries on adjacent parcels below the rim of the Snake River canyon near Buhl. As is material here, in the 1960s and 1970s, the parties began submitting applications for permits to appropriate water for fish propagation purposes from springs that flow from the canyon walls above the Snake River.

2. The parties entered into a private interim agreement in 1980 that allocated the water between them "until a legal determination is made or [further] agreement made regarding Permits Nos. 36-7004 and 36-2708." The agreed to allocation applied "in the event the water being produced by the Clear Lakes' springs, which is available to Lakes and Springs under their respective permits, goes below 375 cubic feet per second." The agreement provided that under such conditions 53 percent of the water would be allocated to Clear Springs and 47 percent to Clear Lakes. This agreement was clearly an interim agreement pending final determination of the rights of the parties, and notwithstanding the specific priority claims under their respective water rights. The parties operated under this agreement until the current dispute.

3. The parties became engaged in litigation between themselves before the SRBA District Court over the priority of water rights and the identification of water right sources.

4. Matters began to come to a head in 1992 when IDWR filed its "Director's Report for Reporting Area 3" with the SRBA Court, recommending adjudication of priorities with respect to the material water rights from "springs tributary to Clear Lake(s)" as follows: Clear Lakes had the first priority right to draw 100 cubic feet per second ("cfs") from the springs serving the property;[1] Clear Springs had the second priority right to draw 200 cfs;[2] and Clear Lakes had the third priority right to draw 75 cfs.[3] Clear Springs had two more junior rights, one for 51.55 cfs, [4] and the other for 10 cfs.[5] The report was immediately challenged before the SRBA District Court.

5. After extended litigation between the parties, the IDWR Director's report was adopted by the SRBA Special Master, the SRBA District Court, and eventually by the Idaho Supreme Court in a decision released on January 18, 2002. *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.,* 136 Idaho 761, 40 P.3rd 119 (2002). This adjudication gave Clear Lakes the first 100 cfs, Clear Springs the next 200 cfs, Clear Lakes the third 75 cfs, and Clear Springs the final 51.55 cfs, if available. The adjudication was a "legal determination" of the respective rights as set forth in the interim agreement the parties had entered into in 1980 and, as determined by the Director, marked the agreed upon event for termination of the water sharing portion of the 1980 agreement.

Creation of the Interim Stipulated Agreement

6. While the final stages of the litigation over the water rights and the priorities between Clear Springs and Clear Lakes was pending before the Idaho Supreme Court, another

[1] Water right no. 36-02659, priority date 06/23/1966.
[2] Water right no. 36-02708, priority date 09/28/1966.
[3] Water right no. 36-07004, priority date 07/21/1967.
[4] Water right no. 36-07218, priority date 01/24/1972.

concern relating to the Eastern Snake River Plain Aquifer was being addressed by IDWR – a dwindling supply of water flowing from the springs fed by the aquifer. In August of 2001, the Director issued a notice that IDWR intended to curtail certain ground water users diverting on the plain above the canyon rim within the Thousand Springs Ground Water Management Area (GWMA) because there was insufficient ground water to provide a reasonably safe supply for irrigation or other uses in the basin at the then current rates of withdrawal as a result of the severe drought conditions that began in 2000 and continued through 2001.

7. This notice prompted ground water users and surface water users to negotiate an interim agreement pertaining generally to ground water users above the rim, known as the *Interim Stipulated Agreement For Areas Within And Near IDWR Administrative Basin 36* ("Interim Stipulated Agreement"). This agreement was signed by entities representing a number of ground water users on the plain, and a number of surface water users dependent upon waters discharged from the canyon springs, including both Clear Springs and Clear Lakes.

8. Under the Interim Stipulated Agreement, the ground water users agreed to provide up to 40,000 acre feet of water per year to enhance the flows in the Thousand Springs reach until a more reliable evaluation of the impacts of ground water use on generally senior priority surface water rights dependent on spring discharges could be completed by December of 2003, using a reformulated and recalibrated ground water model. A major section of this agreement consisted of the agreements among ground water users for pooling of and payment for the water to provide the required 40,000 acre feet of replacement water.

[5] Water right no. 36-07201, priority date 08/04/1971. This right as decreed is administered as being from a source separate from the other four rights and is therefore not affected by the instant dispute.

9. The Interim Stipulated Agreement contained a specific clause limiting the rights of the parties to pursue actions against other parties for curtailment of water. The clause is referred to as the "safe harbor" provision, and reads as follows:

> In exchange for the commitments enumerated in paragraphs 2.1 through 2.7[6] the undersigned holders of senior priority surface rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction other than as provided in paragraph 2.7,[7] of any junior water rights held by or represented by the undersigned within Basin 36 for the term of this agreement.

10. This agreement came into being during the fall of 2001, and was ready for signature by early November. The various parties signed the agreement in counterparts over the next few months. Clear Springs signed the agreement early in the process, on November 16, 2001. Clear Lakes signed the agreement late in the process, on January 17, 2002.

The Director's Orders Following the Interim Stipulated Agreement

11. The Director entered two orders shortly following the execution of the Interim Stipulated Agreement: an order approving the agreement; and an order creating a new water district to administer the water rights in the area of concern to the agreement.

12. The Director entered the order approving the Interim Stipulated Agreement on January 18, 2002, the day after Clear Lakes signed it. By this order, the Director approved the interim stipulated agreement, but did not incorporate it into the order. As is relevant to this proceeding, and with respect to the "safe harbor" clause, the Director made the following finding of fact:[8]

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[6] These sections generally pertain to the ground water users commitments to provide replacement water of up to 40,000 acre feet to enhance the Thousand Springs reach of the Snake River.

[7] Section 2.7 of the Stipulated Agreement provides for the alternative of acreage reduction in the event some or all of the 40,000 acre feet of replacement water is not available.

[8] Finding of Fact No. 4, "Order Approving Stipulated Agreements," dated January 18, 2002, entered by the Director in proceeding captioned "In the Matters of the American Falls Ground Water Management Area and The Thousand Springs Ground Water Management Area."

> Under the agreements, the represented holders of senior priority surface rights agreed not to exercise their senior priorities against the represented holders of junior priority ground water rights in exchange for commitments by the ground water right holders to provide specific quantities of replacement water during the two year term of the Agreements as a replacement for water that would have resulted from curtailment of ground water diversions intended by the Director.

13. Of significant note is the difference in wording between the "safe harbor" clause in the stipulated agreement and the language of the Director's order. The stipulated agreement states that the "holders of senior priority surface water rights and their representatives agree not to seek either judicially or administratively the curtailment or reduction . . . of any junior water rights held by or represented by" a party to the agreement, while the Director's finding observes that the forbearance agreed upon extended only to "represented holders of junior priority *ground* water rights" of a party to the agreement.

14. In other provisions of the referenced order, the Director concluded that with the Interim Stipulated Agreement in place, further curtailment of ground water in the Thousand Springs GWMA was unnecessary for at least the next two years, but that interim administration of water rights in the Thousand Springs GWMA, and certain rights immediately adjacent to the GMWA, was necessary to protect the water supply available to satisfy senior priority surface water rights diverting from the springs or otherwise dependent on spring discharges.

15. The Director ordered that the watermaster for the new water district shall have the authority to, among other things, curtail out-of-priority diversions not covered by the Interim Stipulated Agreement.[9] No party questioned the Director's reading of the "safe harbor" provision of the agreement and this order was not challenged by any party in any administrative proceeding before the Director under the IDAPA.[10]

[9] *Op. Cit.,* Conclusions of Law 4, 5 and 6.

[10] The order provides that it is an interlocutory order, and is therefore not subject to review by reconsideration or appeal under IDAPA 37.01.01710. The Director may review the order pursuant to IDAPA 37.01.01711.

16. On February 19, 2002, a "Final Order Creating Water District No. 130" was issued by the Director. This order refers to the Interim Stipulated Agreement in the recitals and findings of fact, and notes the Director's approval thereof by order entered January 18, 2002. This order then sets out separately the protection to be provided to junior priority water rights:

> Under the agreements, the represented holders of senior priority surface water rights agreed not to exercise their senior priorities against the represented holders of junior priority ground water rights in exchange for commitments by the ground water right holders to provide specific quantities of replacement water during the two-year term of the stipulated Agreements.[11]

17. This order repeats the authority of the watermaster of the newly created water district, as is material here, to "Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights if not covered by a stipulated agreement or a mitigation plan approved by the Director."[12] Again, no party questioned how the Director construed the "safe harbor" provision from the Interim Stipulated Agreement. This order was not challenged by any party in any administrative proceeding before the Director, or before the district court on judicial review, under the IDAPA.

The Director's Instructions to the Watermaster

18. Following the creation of Water District No. 130, Clear Springs inquired of the Director how IDWR intended to administer the water rights held by Clear Springs and Clear Lakes in the event of a call. After having met with both entities on site on April 2, 2002, the Director by letter dated April 11, 2002, asked each entity to provide any additional information believed to be pertinent in developing the watermaster instructions for administering the rights. Both entities submitted responding information to the Director on May 2, 2002. Clear Lakes

[11] Finding of Fact No. 5, "Final Order Creating Water District No. 130," dated February 19, 2002, entered by the Director in proceedings captioned "In the Matter of Creating The Thousand Springs Area Water District, Designated as Water District No. 130, etc."

later supplemented the information it supplied. At no time during this information gathering process did Clear Lakes provide information to the Director asserting its broad interpretation of the "safe harbor" provision in the Interim Stipulated Agreement.

19. On June 5, 2002, the Director issued a departmental memorandum to the watermaster of Water District No. 130 containing the first set of comprehensive instructions for distribution of water among the competing water rights of Clear Springs and Clear Lakes. After an informal meeting with Clear Lakes, and consideration of matters raised in informal correspondence from the parties, the Director issued a departmental memorandum with an amended set of instructions.

20. The instructions are detailed and technical, but as is relevant to the instant proceeding, they provided that the watermaster was to adjust the 6-ft adjustable weir at the so-called "Western Pool" to allocate the waters available in accordance with the priorities between Clear Lakes and Clear Springs as adjudicated in the SRBA litigation.

21. Clear Lakes informally objected to the first set of instructions, and a conference with the Director was held. On June 10, 2002, the Director wrote a letter to Clear Lakes and its counsel, with copies to Clear Springs and its counsel, confirming this meeting and confirming the Director's agreement to review the watermaster's instructions in light of Clear Lakes' objections.

22. In this review, the Director agreed to take into consideration certain documents and actions. Of note is that the first set of instructions, issued June 5, 2002, does not mention the Interim Stipulated Agreement as being a consideration in the formulation of the instructions. All of the documents and actions that the Director was asked to consider, as set forth in his letter of June 10, involved either the parties 1980 interim agreement, or motions, briefs, and orders

[12] *Op. Cit.,* Conclusion of Law 10(d).

entered in the SRBA litigation. Because no party raised it, nothing was said in the June 10, 2002 letter, or in the subsequent amended instructions to the watermaster issued June 13, 2002, of the Interim Stipulated Agreement between the ground water users and the surface water right holders, and in particular no mention was made of the "safe harbor" provision.

23. Following the review as requested by Clear Lakes, the Director issued an amended set of instructions by departmental memorandum to the watermaster on June 13, 2002. As the Director noted in a letter to the parties through their counsel, although five additional pages were added to the instructions to the watermaster following the review of the materials requested, the Director's previous conclusions regarding how the water rights should be administered remained unchanged.

24. On June 19, 2002, the watermaster of Water District No. 130 issued her notice of intent to redistribute flows to Clear Lakes and Clear Springs. By this notice, the watermaster advised the parties that, pursuant to the Director's instructions of June 13, 2002, she was going to adjust the 6-ft adjustable weir at the "Western Pool" to redistribute the flow of water between the two entities on July 3, 2002. This notice advised the parties that they could contest the action by petition to the IDWR within fifteen days, as provided by Idaho Code § 42-1701A(3).

25. On July 3, Clear Lakes requested the Director to delay the redistribution of flows to give Clear Lakes a full 15 days to decide whether to request a hearing before IDWR. Clear Lakes did not file a petition with the IDWR to contest the watermaster's notice by administrative action within the time mandated by the notice. At no point in this extended process did Clear Lakes suggest that Clear Springs was precluded by the "safe harbor" provisions of the Interim Stipulated Agreement from making a call against Clear Lakes for distribution of water under its senior water right.

26. On July 5, 2002, the watermaster adjusted the 6-ft adjustable weir at the "Western Pool" to reallocate the water between Clear Springs and Clear Lakes as stated in the Director's instructions to the watermaster, and in the watermaster's notice of intent.

The Gooding County District Court Litigation

27. Clear Lakes filed a lawsuit in the district court of the Fifth Judicial District in Gooding County on June 20, 2002, naming the IDWR, the Director, and the watermaster as defendants. Shortly after this suit was filed, Clear Springs moved and was granted permission to intervene as an additional party defendant. Clear Springs' motion to intervene was granted on July 2, 2002.

28. There is no dispute that the gravamen of this lawsuit was a challenge to the watermaster's notice of intent to regulate flows based in part on Clear Lakes' position that the Director had no authority to instruct the watermaster to curtail Clear Lakes' water rights.

29. Clear Lakes sought a preliminary injunction against IDWR to enjoin the curtailment of its water, which was denied by the court on July 2, 2002.

30. Clear Springs filed a motion to dismiss and IDWR filed a motion for summary judgment. Before the motions were heard, the plaintiff Clear Lakes and the defendant IDWR entered into a stipulation for dismissal of the action. The stipulation specifically provided that the lawsuit would be dismissed *with prejudice.* The stipulation for dismissal contained the following language:

> 2. Upon the Court's approval of this Stipulation for Dismissal, the Court may order the above-captioned action dismissed with prejudice, each of the parties hereto to bear its own costs and attorney fees.
>
> 3. IDWR acknowledges Clear Lake's right under applicable statutes and rules to file a petition with IDWR initiating an administrative contested case for the purpose of seeking review and modification of the Amended Watermaster

> Instructions for Distribution of Water … issued June 13, 2002 and the actions taken in accordance with those instructions under the watermaster's June 19, 2002 Notice of Intent to Redistribute Flows, which together implemented IDWR's ongoing responsibility to administer the water rights, which are the subject of the above captioned action, in accordance with applicable law.
>
> 4. The director of IDWR commits to provide for the holding of an administrative hearing or hearings to hear all issues within the jurisdiction of IDWR raised in the petition referred to in paragraph 3 above.

31. Clear Springs was not a party to the stipulation for dismissal. The language in the stipulation pertaining to proceeding with an administrative hearing does not apply to Clear Springs. Notwithstanding that Clear Springs was not a party to the stipulation, the lawsuit was also dismissed as to it, and the dismissal was also *with prejudice.*

32. The "with prejudice" language was not an oversight or the inadvertent insertion of boilerplate into an order that the parties contemplated would be without prejudice. The district judge specifically commented upon this language when addressing the order to be entered, and counsel for Clear Lakes clearly reiterated to the court that the intent was a dismissal *with prejudice*.

ANALYSIS

In this administrative proceeding, Clear Lakes has petitioned the Director to determine that the watermaster's curtailment of Clear Lake's diversion of water on July 5, 2002, violates IDWR's duty to administer water in accordance with the Interim Stipulated Agreement.

The first step in the analysis is the relationship between the Interim Stipulated Agreement and the actual orders and instructions of the Director of the IDWR. Clear Lakes argues that the Interim Stipulated Agreement is the binding document, and that the Director is bound by its terms. Clear Lakes bases much of its position upon the contention that the "safe harbor" clause

in that agreement is not ambiguous, and that the Director is obligated to enforce it according to its terms. This argument is flawed.

Neither the Director nor IDWR was a party to the Interim Stipulated Agreement. Only the various water-using entities were parties to this agreement. The agreement was prompted by the Director's advice that he would curtail ground water users above the rim if some agreement among users was not forthcoming. While the Interim Stipulated Agreement was submitted to the Director for his approval, and the agreement became the basis for several important orders issued by the Director, the orders he issued, and not the agreement, are what establishes and defines the actions under examination in this proceeding.

The Director has the statutory authority and duty to regulate water use throughout the state. The Director has the authority and duty to protect the priority of senior water right holders from encroachment or interruption from junior water right holders. Private parties cannot withdraw the Director's authority under the statutes or limit his duties imposed by statute by private agreement.

Clear Lakes argues that the Interim Stipulated Agreement went through several drafts; that early drafts provided that the safe harbor clause did work only to protect junior ground water users; but that the final draft eliminated the limitation to ground junior water right holders and extended the protection of the clause to "any" junior water right holder. Clear Lakes argues that this iteration of language in the various drafts makes it clear that the final intent of the agreement was not to be limited to ground water users, but was to protect all junior water right holders. Clear Lakes argues that the Director is bound by the clear, unambiguous wording of the agreement as it was finally constructed between the parties. The Hearing Officer disagreed with this argument and the Director concurs with the Hearing Officer.

The Hearing Officer agreed that the Director under his authorities had discretion to accept this clause as it was written, and had the discretion to incorporate the protections of this clause into his subsequent orders providing for the administration of the new water district, had the Director determined such action to be appropriate and consistent with his statutory duties. But he was not bound to do so. Private parties cannot tie the Director's hands by private agreement.

It is clear from the plain wording of the orders that IDWR entered in this case that the Director did not accept the breadth of the "safe harbor" clause in the Interim Stipulated Agreement as is now argued for by Clear Lakes. No party to the agreement timely raised an objection to the Director's more narrow reading of the "safe harbor" provision. In both the order entered approving the agreement on January 18, 2002, and the order entered establishing the new water district entered February 19, 2002, the Director clearly limited the extent of the safe harbor protection to junior *ground* water users. The early order was interlocutory but the second order was clearly final. There was no appeal or action to seek review of this order.

Had the broad reading of the "safe harbor" provision been brought to the attention of the Director by Clear Lakes or another party to the Interim Stipulated Agreement, it is likely that the Director would have rejected such a broad application of the "safe harbor" provision on public policy grounds. The Director has the statutory authority and duty to regulate water use in accordance with Idaho law and the prior appropriation doctrine. The Director determined that approval of the Interim Stipulated Agreement as between surface and ground water users would be consistent with controlling principles of law because of the enforcement provisions in the agreement applicable to ground water users.

Clear Lakes' invitation to the Director to read the "safe harbor' provision as protection for junior surface water right holders from a call by other senior surface right holders is in reality an invitation to disorder. Under Clear Lakes' reading of the provision, senior surface right holders give up the legal right to "seek either judicially or administratively" the curtailment or reduction of more junior surface water rights under which the state has authorized water to be diverted. As should be readily apparent, implementation of this interpretation would allow Clear Springs the option of diverting up to 251.55 cfs from the "Western Pool" (200 cfs under water right no. 36-02708 and 51.55 cfs under water right no. 36-07218). Clear Lakes would be precluded from making a priority call for distribution of water to its senior priority right, water right no. 36-02659.

The effect upon Clear Lakes and Clear Springs of such a water allocation scheme would be unfavorable to Clear Lakes. Under current spring discharge conditions and application of Clear Lakes' reading of the "safe harbor" provision, Clear Springs could receive from 20 cfs to 35 cfs, more or less, of additional water supply from the "Western Pool" and Clear Lakes could receive approximately 20 cfs to 35 cfs less water supply, being limited to only the supply of water available to it from the so-called "Eastern Pool." This would be true only because Clear Lakes would have given up its right to rely upon the more senior priority dates of its two water rights from the same source. Such a perversion of the priority doctrine perhaps could be avoided if the parties were to engage in various types of self-help to protect their rights in the absence of available recourse to judicial or administrative relief. Leaving the parties with no avenue for relief other than self-help does not comport with sound public policy and it is therefore unlikely that the Director would have approved the broad reading of the "safe harbor" provision even if it had been timely brought to his attention.

Clear Lakes argues that the Director is committed to enforce the Interim Stipulated Agreement by the terms of the order entered February 19, 2002, creating the new water district. Counsel points to Conclusion of Law 10(c) for this argument, which reads:

> 10. The Director concludes that the watermaster … shall perform the following duties in accordance with guidelines, direction and supervision provided by the Director: …
>
> c. Enforce the provisions of the stipulated agreements *approved by the director*…. [Emphasis added].

By this last emphasized language, the Director reserved the ability to limit or qualify the enforcement of the Interim Stipulated Agreement. He did this in the case of the "safe harbor" provision, both in the order approving the agreement and in the order creating the water district. The Director, in effect, stated that he will recognize and enforce the Interim Stipulated Agreement, in accordance with the qualifications and limitations he imposed, in accordance with his obligations under state law. It is clear under the law that the Director has the authority to do just that.

Clear Springs argues that the proper examination in this proceeding is whether the Director's instructions to the watermaster, and the watermaster's subsequent notice of intent to curtail water flows, was consistent with the authority established by the February 19, 2002, order establishing the water district. With respect to the instructions to the watermaster, Clear Springs argues that deference should be given to the Director when he is interpreting his own order, citing *Angstman v. City of Boise,* 128 Idaho 575 (App. 1966), and that the Director's interpretation should not be overturned unless it is plainly erroneous or inconsistent, citing *Idaho Mining Ass'n v. Browner,* 90 F. Supp 2d 1078 (U.S.D.C., Idaho, 2000). The Hearing Officer agreed with this standard of analysis and the Director concurs.

Under this analysis, the intent of the parties to the Interim Stipulated Agreement is immaterial. It is not necessary to determine whether the parties' intent for the "safe harbor" clause was to reach priority disputes between surface water right holders, or was only to protect ground water users from the threat of the Director's order of curtailment. By his orders, the Director limited his recognition of the provision in the agreement to the latter. It is not necessary to determine whether there is any consideration flowing from Clear Lakes for the claimed protection of the "safe harbor" clause. The decision does not turn on contract principles but on the authority of the Director to approve those provisions of the Interim Stipulated Agreement that were to be incorporated into the Director's administrative orders.

The Director had the authority to limit his recognition of the "safe harbor" language. The Stipulated Interim Agreement came about because of the Director's concern over dwindling water supplies in The Thousand Springs reach. The impact of the notice in August 2001, was to advise that, unless the water users came up with an agreement, the Director would curtail ground water use in the plain above the canyon rim. The target group in danger of curtailment by action of the Director, then, was the ground water users from the aquifer on the plain above the rim.

The issues related to allocation of water between Clear Springs and Clear Lakes, on the other hand, had been the subject of extended litigation in the SRBA court. At the very time the Interim Stipulated Agreement was being drafted and circulated, these issues were in the process of being finally resolved by the Idaho Supreme Court. The final decision of the Supreme Court was released on January 18, 2002, one day after the Interim Stipulated Agreement was signed by Clear Lakes. There would be no reason for the Director to interfere with this final decision of the Idaho Supreme Court on these issues. There would be no reason for the Director to extend the "safe harbor" provision beyond the target group of water users in danger of curtailment by

the Director's actions. In sum, the Director's construction limiting the reach of the "safe harbor" provision is fully consistent with the August notice to water users that caused the agreement to come into being in the first place.

A second stumbling block to the arguments advanced by Clear Lakes is the dismissal of the Gooding County litigation with prejudice. Clear Lakes argues that the stipulation for dismissal clarifies the intention of the parties to retain the right to proceed with the administrative hearing, notwithstanding the dismissal of the state court litigation. However, the language of the dismissal – *with prejudice* – carries significant legal ramifications. A dismissal with prejudice operates as an adjudication on the merits of all claims within the scope of the complaint, and bars further litigation of the same issues under the doctrine of *res judicata.*

Certainly the gravamen of the lawsuit – whether the director had the authority to issue the instructions in the first place – was adjudicated by the dismissal with prejudice. That a dismissal with prejudice is an adjudication on the merits is a matter of definitive rule; the parties cannot give this definitive meaning of the rule a different meaning by private agreement. In any event, since Clear Springs was not a party to the stipulation, there is no argument now, as the Hearing Officer concluded, that the dismissal with prejudice as to Clear Springs is anything other than an adjudication on the merits.

The rule recently announced by the Idaho Supreme Court is that, absent fraud, a Rule 41 dismissal with prejudice is an adjudication on the merits and,

> …in an action between the same parties upon the same claim or demand, the former adjudication [i.e., the Rule 41 dismissal] concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit.[13]

[13] *Kawai Farms v. Longstreet*, 121 Idaho 610 (1992), referring to *Diamond v. Farmers Insurance*, 119 Idaho 146 (1990) and citing with approval *Joyce v. Murphy Land & Irrigation Co.*, 35 Idaho 549 (1922).

Under Rule 41 of the Idaho Rules of Civil Procedure, a dismissal before trial is without prejudice unless otherwise stipulated by the parties or ordered by the court. If the parties had said nothing, the dismissal would have been without prejudice. In this case, the trial judge specifically inquired as to the "with prejudice" language in the stipulation and proposed order, and was advised by counsel that the language was correct. It was not an oversight or inadvertent error in placing boilerplate language into the documents.

The dismissal of the Gooding County lawsuit with prejudice was a final court adjudication on the issue of the Director's authority to issue the June 13, 2002, amended instructions to the watermaster, and of the June 19 2002, notice of action issued by the watermaster. Insofar as the stipulation provided for further administrative inquiry into the actions of the watermaster, that inquiry would have to be based upon some significant change in circumstances. It perhaps also could be directed into technical areas of compliance with the call made by Clear Springs, or into the accuracy of the watermaster's methods and measurements. Any inquiry into the authority of the watermaster under the instructions from the Director, or into the Director's authority is barred by the doctrine of *res judicata.*

CONCLUSIONS OF LAW

1. The Director had authority to exercise reasonable discretion in approving the provisions of the Interim Stipulated Agreement. The Director was not obligated or bound by the stipulated agreement as to parts not approved in the January 18, 2002, Order Approving Interim Stipulated Agreement, and incorporated into the February 19, 2002, Order Creating Water District No. 130.

2. Notwithstanding the lawful discretion of the Director in approving the provisions of the Interim Stipulated Agreement, the Director in fact construed the "safe harbor" provision of the agreement as extending only to the holders of ground water rights covered by the agreement.

3. The February 19, 2002, Order Creating Water District No. 130 sets forth the "safe harbor" provision from the Interim Stipulated Agreement as recognized by the Director.

4. The Director did not recognize or incorporate a broad interpretation of the "safe harbor" provision extending the protection to junior surface water right holders. By the plain reading of the order, the Director extended the safe harbor provision only to junior ground water right holders.

5. The dispute between Clear Springs and Clear Lakes over the water allocation between their respective rights in this case was not within the reach of the Director's order of February 19, 2002, notwithstanding the potential for a broad application of the language of the Interim Stipulated Agreement.

6. Continued litigation over this issue by administrative proceeding is foreclosed by the district court order of dismissal with prejudice in the Gooding County litigation. The dismissal with prejudice operates as an adjudication on the merits of all issues raised in that action, and, in the absence of fraud, bars further litigation under the doctrine of *res judicata.*

7. Clear Lakes is prevented from raising the issue of the Director's or the watermaster's authority in this proceeding, and Clear Lakes also is prevented from separately attempting to enforce the Interim Stipulated Agreement in this proceeding against Clear Springs.

8. These issues came within the admitted gravamen of the Gooding County district court litigation, and were resolved by the dismissal with prejudice.

9. Clear Lakes is not precluded by the doctrine of *res judicata* from initiating a contested case before IDWR in the future, as contemplated by the stipulation for dismissal before the district court, seeking review and modification of IDWR's watermaster instructions based upon a significant change inapplicable circumstances.

ORDER

IT IS, THEREFORE, HEREBY ORDER as follows:

1. The motion for summary judgment filed by Clear Lakes is DENIED.

2. The motion to dismiss filed by Clear Springs is GRANTED.

3. The motion filed by Clear Lakes for stay of the watermaster's activities is DENIED, effective with the date of this order.

4. The Watermaster for Water District No. 130 is directed to immediately resume administration of the water rights subject to this proceeding in accordance with the watermaster instructions issued by the Director on June 13, 2002.

Dated this 13th day of June, 2003.

___/Signed/___
KARL J. DREHER
Director